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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

17 CR 243 (SHS)

5 BROOKE MARCUS,

6 Defendant.

7 -----x

8 New York, N.Y.
9 September 28, 2018
3:20 p.m.

10 Before:

11 HON. SIDNEY H. STEIN,

12 District Judge

13
14 APPEARANCES

15 GEOFFREY S. BERMAN
16 United States Attorney for the
Southern District of New York
17 KIERSTEN FLETCHER
Assistant United States Attorney

18 KREINDLER & KREINDLER
19 Attorneys for Defendant
MEGAN BENETT

20
21 ALSO PRESENT: WINTER PASCUAL, Pretrial Services
CHRISTOPHER BASTOS, NYPD

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(Case called)

MS. FLETCHER: Good afternoon, your Honor, Kiersten Fletcher for the government, and I'm joined at counsel's table by Detective Christopher Bastos of the NYPD and Homeland Security Investigations.

THE COURT: Good afternoon.

From Pretrial?

MR. PASCUAL: Winter Pascual, your Honor.

Defense?

MS BENETT: Good morning, your Honor, Megan Benett on behalf of Brooke Marcus, who is standing to my left.

THE COURT: Good morning, please be seated.

The supposition is this is not necessary since it was so long ago, but it doesn't matter telling the parties that when I was in private practice I represented the firm of Kreindler & Kreindler in one or more litigations. I have been a judge for 23 years, so it was more than 23 years ago, just so everyone is aware.

MS BENETT: I know the historical fact, and just for the record, it predates my time at the firm as well. Thank you, your Honor.

THE COURT: Government is this for arraignment and change of plea? I take it we have to enter a plea first.

MS. FLETCHER: Yes, your Honor, this is both presentment and arraignment and change of plea.

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1 THE COURT: It's everything.

2 MS. FLETCHER: Yes, it's everything.

3 THE COURT: Defense, would you rather at the
4 arraignment you enter your plea of not guilty and then move to
5 change it, or do it as she entered a plea of guilty.

6 MS BENETT: Frankly, I think we can enter the plea of
7 guilty initially.

8 THE COURT: On the arraignment.

9 MS BENETT: Yes.

10 THE COURT: All right. If that's what you wish.

11 Ms. Marcus, if you would stand, please. I wish to
12 inform you of basic constitutional rights you have. In our
13 criminal justice system you do have the right to remain silent,
14 Ms. Marcus. You don't have to make any statement whatsoever.
15 And even if you have already made statements to the law
16 enforcement authorities, you do not have to make any additional
17 statements. Any statements that you do make may be used
18 against you. Do you understand those rights?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: You have the right to be represented by an
21 attorney today and at all future proceedings in this case, and
22 if you're unable to afford an attorney, I will appoint an
23 attorney to represent you. Do you understand that?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: I take it you already retained an

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1 attorney, is that correct?

2 THE DEFENDANT: Yes.

3 THE COURT: And who is that?

4 MS BENETT: Your Honor, just to be clear, I was
5 appointed to represent Ms. Marcus pursuant to the Criminal
6 Justice Act when she was originally a witness, so I don't know
7 if we need to do anything now that she is a defendant in this
8 case.

9 THE COURT: My deputy informs me there's nothing
10 online in regard to whether your client met the CJA
11 requirements for appointment as CJA attorney.

12 MS BENETT: She did. It was docketed under USA v. Doe
13 because on Tuesday when she appeared in magistrate court she
14 was not charged. So I can forward to the Court the entry
15 appointing me after she submitted the CJA affidavit, if that
16 would help, and perhaps the Court could adopt whatever the
17 magistrate court already found in terms of her eligibility.

18 THE COURT: I don't know whether we should be doing
19 that or having a new CJA --

20 MS BENETT: Or we could file a new Form 23A. I could
21 fill that out quickly.

22 THE COURT: Let's do that.

23 Government, you look quizzical.

24 MS. FLETCHER: No, your Honor, the government's view I
25 think is that the prior affidavit was sufficient for Ms. Benett

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1 to be appointed, but if the Court --

2 THE COURT: It's easier.

3 MS. FLETCHER: Okay.

4 THE COURT: The assumption is the form will not be
5 difficult to fill out.

6 (Pause)

7 MS BENETT: Your Honor, I'm handing up the --

8 THE COURT: And my representation of Kreindler &
9 Kreindler, which ended before I became a judge, involved only
10 civil matters.

11 Would you administer the oath to Ms. Marcus, please.

12 (Defendant sworn)

13 DEPUTY CLERK: Please state your full name and spell
14 it for the record.

15 THE DEFENDANT: Brooke Carol Marcus, B-R-O-O-K-E
16 C-A-R-O-L M-A-R-C-U-S.

17 THE COURT: Ms. Marcus, do you swear to the
18 truthfulness of the information set forth in this CJA financial
19 affidavit, Form 23?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: And is this your signature?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: I signed it as approved, and I hereby
24 appoint Megan Benett pursuant to the Criminal Justice Act to
25 represent Ms. Marcus. She has previously been approved in a

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Jane Doe proceeding.

MS BENETT: Thank you, your Honor.

THE COURT: Have you received a copy of Superseding Information S9 17 Crim. 243?

THE DEFENDANT: Yes.

THE COURT: Did you discuss it with your attorney?

THE DEFENDANT: I did.

THE COURT: And did she answer your questions about it?

THE DEFENDANT: She did.

THE COURT: You have the right to have me read it in open court, but you don't have to have me read it, it's entirely up to you.

THE DEFENDANT: It's fine.

THE COURT: I accept that as a knowing and voluntary waiver.

Your attorney informs me that you wish to plead guilty to the superseding information, is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: Well, I'm not permitted simply to accept your guilty plea, there are a number of things I have to do to protect your rights and make sure that you understand what you're pleading guilty to and the consequences of entering a plea of guilty and what rights you're going to be giving up and other things, including I need to know there's an actual

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1 factual basis for the plea.

2 MS. FLETCHER: Your Honor, I apologize for
3 interrupting, and I apologize if I'm interrupting your Honor's
4 flow, but does Ms. Marcus need to waive indictment and consent
5 to the final information?

6 THE COURT: That will be part of the plea.

7 MS. FLETCHER: Thank you, your Honor.

8 THE COURT: At the end of plea you can let me know if
9 I left anything off of your checklist.

10 MS. FLETCHER: I will sit down until then.

11 THE COURT: You don't have to if something is
12 critical, and you can also have Rule 11. Everyone here wants
13 to do it correct.

14 Now Ms. Marcus, my deputy administered the oath to you
15 a moment ago. Do you remember that?

16 THE DEFENDANT: Yes.

17 THE COURT: Do you understand that you're now under
18 oath and if you answer any of my questions falsely, your false
19 or untrue answers may later be used against you in another
20 prosecution for perjury or for making a false statement?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: And I believe you told me your full name,
23 correct, what is it?

24 THE DEFENDANT: Brooke Carol Marcus.

25 THE COURT: How old are you, Ms. Marcus?

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1 THE DEFENDANT: 51.

2 THE COURT: Pardon me?

3 THE DEFENDANT: 51.

4 THE COURT: How far did you go in school?

5 THE DEFENDANT: High school.

6 THE COURT: Did you graduate?

7 THE DEFENDANT: Yes.

8 THE COURT: Are you able to read, write, speak and
9 understand English?

10 THE DEFENDANT: Yes.

11 THE COURT: English is your native language?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Are you now or have you recently been
14 under the care of a doctor or psychiatrist?

15 THE DEFENDANT: No, your Honor.

16 THE COURT: Have you ever been treated or hospitalized
17 for any mental illness or any type of addiction, including drug
18 or alcohol addiction?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: When was that?

21 THE DEFENDANT: I'm currently on a methadone program.

22 THE COURT: Did you receive any inpatient program --

23 THE DEFENDANT: No.

24 THE COURT: -- for your addiction?

25 What was the addiction to?

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1 THE DEFENDANT: Heroin.

2 THE COURT: But you have never had any inpatient
3 program like a 28-day program or week-long program?

4 THE DEFENDANT: I have about 20 years ago.

5 THE COURT: But not since?

6 THE DEFENDANT: Not since then.

7 THE COURT: In the past 24 hours have you taken any
8 drug, medicine or pills or consumed any alcohol?

9 THE DEFENDANT: No, your Honor.

10 THE COURT: I assume you took methadone.

11 MS BENETT: Your Honor, Ms. Marcus has visited -- she
12 was flown here from the District of Arizona for the purpose of
13 these proceedings. She had a courtesy appointment in a
14 methadone clinic on Tuesday and on Wednesday.

15 THE DEFENDANT: No, just Tuesday.

16 MS BENETT: On Tuesday, she was not able to go
17 yesterday or today, so she has not had methadone in the last --

18 THE COURT: So she answered my question --

19 MS BENETT: She answered your question correctly.

20 THE COURT: Fine, as I assumed she would.

21 Is your mind clear today, Ms. Marcus?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: Are you feeling all right?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: Are you represented by an attorney?

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1 THE DEFENDANT: Yes.

2 THE COURT: And who is that?

3 THE DEFENDANT: Megan Benett.

4 THE COURT: Ms. Benett, it sounds like you have had
5 some involvement with Ms. Marcus before today. Do you have any
6 doubt as to her competence?

7 MS BENETT: I do not.

8 THE COURT: Now I believe your attorney said that you
9 wished to enter a plea of guilty today, is that correct,
10 Ms. Benett?

11 MS BENETT: Yes, your Honor.

12 THE COURT: That was certainly my understanding when I
13 came here. Is that true, Ms. Marcus, do you wish to enter a
14 plea of guilty to the charges against you today?

15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: Have you had a complete opportunity to
17 discuss your case with Ms. Benett and to discuss the
18 consequences of entering a plea of guilty?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: Are you satisfied with Ms. Benett and her
21 representation of you?

22 THE DEFENDANT: Yes.

23 THE COURT: On the basis of Ms. Marcus' responses to
24 my questions and my observations of her demeanor as she stands
25 here before me now, I make the finding that she's fully

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1 competent to enter an informed plea.

2 I have told you already, Ms. Marcus, that I'm going to
3 be asking you questions. The purposes is for me to make sure
4 you understand the consequences of entering a plea of guilty
5 and for me to come to the conclusion that you are in fact
6 guilty, or rather that you wish to plead guilty because you are
7 in fact guilty.

8 I want you to listen to me carefully, and if you don't
9 understand anything I'm asking you or saying to you, I want you
10 to stop me and I will answer any of your questions. You can
11 ask Ms. Benett anything you want. Do you understand that?

12 THE DEFENDANT: Yes.

13 THE COURT: Under the Constitution and laws of the
14 United States, you have a right to a speedy and public trial on
15 the charges against you which are contained in Superseding
16 Information S9 17 Crim 243. Do you understand that?

17 THE DEFENDANT: Yes.

18 THE COURT: If there were a trial, you would be
19 presumed innocent and the government would be required to prove
20 you guilty by competent evidence and beyond a reasonable doubt.
21 You would not have to prove you were innocent at a trial. Do
22 you understand those rights?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: If there were a trial, a jury composed of
25 twelve people selected from this district would have to agree

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1 unanimously that you were guilty. Do you understand those
2 rights?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: Because this is being recorded, you have
5 to say the answer. I need something more than a nod.

6 You have a right to be represented by an attorney at
7 trial and at every or stage of the proceeding. If you could
8 not afford an attorney, one will be provided to you at no cost
9 to you. Do you understand those rights?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: If there were a trial, you would have the
12 right to see and hear all the witnesses against you, and your
13 attorney could cross-examine them. You would have a right to
14 have your attorney object to the government's evidence and
15 offer evidence on your own behalf if you so desired, and you
16 would have the right to have subpoenas issued or other
17 compulsory process used to compel witnesses to testify in your
18 defense. Do you understand those rights?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: If there were a trial, you would have the
21 right to testify if you wanted to, but no one could force you
22 to testify if you did not want to, and no inference or
23 suggestion of guilt could be drawn if you decided not to
24 testify at a trial. Do you understand those rights?

25 THE DEFENDANT: Yes, your Honor.

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1 THE COURT: Do you understand that by entering a plea
2 of guilty today, you're giving up each and every one of the
3 rights I described, you're waiving those rights, and that there
4 will be no trial in the case against you?

5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: Do you understand that you have the right
7 to change your mind right now and refuse to enter a plea of
8 guilty. You don't have to enter this plea if you do not want
9 to for any reason. Do you understand that?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: Now I believe you already told me you
12 received a copy of the Superseding Information S9 17 Crim 243
13 and you read it and discussed it with your attorney, is that
14 right?

15 THE DEFENDANT: Correct.

16 THE COURT: If you want, I will read that information
17 to you, but you don't have to --

18 THE DEFENDANT: It's fine.

19 THE COURT: Okay. I accept that as a knowing and
20 voluntary waiver.

21 Do you understand that you're charged in that
22 superseding information with engaging in a wire fraud
23 conspiracy from 2008 until 2017 in violation of 18, United
24 States Code, 1349, do you understand that?

25 THE DEFENDANT: Yes, your Honor.

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1 THE COURT: If at any time you want me to take a
2 break, I certainly will, Ms. Marcus, because I can see you're
3 under some strain. So we can take a break whenever you want,
4 and if you want, you can sit down. You decide.

5 THE DEFENDANT: Thank you.

6 THE COURT: Now I'm informing you, Ms. Marcus, that
7 you have a constitutional right to be charged by an indictment,
8 and an indictment is a charge by a grand jury. An information,
9 on the other hand, is simply a charge by the prosecutor. So
10 you're being charged here in an information, which is a charge
11 by the prosecutor. Do you understand?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: But you have a right to be charged in an
14 indictment by a grand jury. Do you understand that?

15 THE DEFENDANT: Yes.

16 THE COURT: I'm going to give you a document titled
17 waiver of indictment. I'm going to mark it as Government
18 Exhibit 1. I'm going to ask my deputy to show it to you.

19 Is that your signature on Government Exhibit 1?

20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: It reads: The above named defendant, who
22 is accused of violating 18 USC 1349, being advised of the
23 nature of the charges and of her rights, hereby waives in open
24 court prosecution by indictment and consents that the
25 proceeding may be by information instead of by indictment. Do

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1 you understand that you have waived the right to be charged by
2 an indictment and you consented to being charged by an
3 information by the government?

4 MS BENETT: Yes.

5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: Did you waive that right knowingly and
7 voluntarily?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Do you understand if you did not plead
10 guilty, the government would have to prove each and every part
11 or element of the charge in Count One beyond a reasonable doubt
12 at a trial?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: Government, please set forth the elements
15 the government would have to prove beyond a reasonable doubt.

16 MS. FLETCHER: Yes, your Honor. The government would
17 first have to prove that the defendant entered into an
18 agreement with others to commit a crime, and second, that she
19 entered that agreement willingly and knowingly. Here the crime
20 is wire fraud as set forth in 18, United States Code, Section
21 1343.

22 THE COURT: And the government would also have to
23 prove venue, which just means that an act in furtherance of the
24 conspiracy took place in the Southern District of New York, but
25 venue would have to be proven simply by a preponderance of the

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1 evidence.

2 Do you understand the elements that the government
3 would have to prove beyond a reasonable doubt?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: Do you understand that the maximum
6 possible penalty of the crime to which you are entering a plea
7 of guilty is 20 years imprisonment, a maximum term of three
8 years supervised release, a maximum fine of the greatest of
9 \$250,000 or twice the gross pecuniary gain derived from the
10 offense, twice the gross pecuniary loss to individuals other
11 than you resulting from the offense, plus a mandatory \$100
12 special assessment. Do you understand that?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: Do you also understand that I can order
15 that you make restitution in an amount specified by the Court?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: Now when I was describing the maximum
18 sentence, I said part of the maximum sentence was three years
19 supervised release. Supervised release, Ms. Marcus, means
20 you're going to be subject to monitoring upon your release from
21 prison, and the monitoring is to be under terms and conditions
22 that could lead to your reimprisonment without a jury trial for
23 all or part of the term of supervised release and without
24 credit for time previously served on post-release supervision
25 if you violate any term or condition of supervised release. Do

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1 you understand that?

2 THE DEFENDANT: Yes.

3 THE COURT: Do you understand that if I accept your
4 guilty plea today and determine that you are guilty, that
5 determination may deprive you of such valuable civil rights as
6 the right to vote, the right to hold public office, the right
7 to serve on a jury and the right to possess any kind of
8 firearm?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: Ms. Benett, I take it -- I shouldn't take
11 it. Ms. Benett, is your client a United States citizen?

12 MS BENETT: She is, your Honor.

13 THE COURT: Thank you. Under current law, Ms. Marcus,
14 there are sentencing guidelines that judges must use in
15 applying the factors set forth in 18, United States Code,
16 Section 3553(a) to determine what a fair and reasonable and
17 appropriate sentence is. Have you talked to Ms. Benett about
18 the sentencing guidelines?

19 THE DEFENDANT: We have discussed it briefly, but
20 not -- I don't really know what --

21 MS BENETT: Your Honor, we talked about the sentencing
22 guidelines and how they function. We haven't done a specific
23 guidelines calculation in the facts.

24 THE COURT: Well, I don't know that I could do that
25 because I don't know the criminal history and a variety of

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1 other things.

2 Is that something you want to undertake, Ms. Benett,
3 before we proceed? Because I certainly will give you time to
4 do that.

5 At a minimum, I'm going to ask you to talk to your
6 client and answer any of her questions about the sentencing
7 guidelines.

8 MS BENETT: Could you give me one second to talk to
9 the government?

10 THE COURT: Of course.

11 (Pause)

12 MS BENETT: Your Honor, Ms. Marcus and I had
13 previously discussed the function and the methodology of the
14 sentencing guidelines and we have had a further conversation
15 now. If the Court wants to ask her any additional questions
16 about her understanding of the sentencing guidelines generally,
17 I think that she would be able to answer that.

18 THE COURT: Ms. Marcus, what I want to understand is
19 whether or not you had a full opportunity to discuss the
20 sentencing guidelines with Ms. Benett and that you feel you
21 have a grasp of how the sentencing guidelines work. It's
22 important for me to believe you know what you're heading for by
23 entering a plea of guilty. And if you have any hesitancy about
24 that at all, I will just adjourn this and we'll give you a full
25 opportunity to talk with Ms. Benett. Do you think you

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1 understand the sentencing guidelines?

2 THE DEFENDANT: I do.

3 MS BENETT: If I could, your Honor, there is an
4 agreement between the government and the defense that I believe
5 has been handed up to the Court.

6 THE COURT: Yes, I have it.

7 MS BENETT: It doesn't contain a guidelines
8 calculation.

9 THE COURT: That is correct.

10 MS BENETT: The information that would drive the
11 offense level in this case has not been -- the government
12 hasn't calculated. I think that we would take a very
13 conservative position on certain -- the loss amount, for
14 example, given the de minimis compensation my client received
15 over the course of her long course of her involvement. I
16 imagine the government might take a different position.

17 So I can't represent to the Court that Ms. Marcus and
18 I have discussed specifically what we expect the government
19 would represent for a guidelines calculation or what the Court
20 might conclude, because the government has sole control over
21 the facts here on the loss amount and we don't know what that
22 is. But we have talked about what factors will be relevant for
23 purposes of calculating the offense level, and we talked about
24 her criminal history category, and we talked about the way the
25 guidelines function as one of several factors that the Court

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1 takes into consideration.

2 THE COURT: Have you given her your estimation or your
3 reasonable belief as to the range of positions the government
4 would be taking?

5 MS BENETT: I think maybe that's a better question put
6 to government if they want to represent the positions that they
7 might be taking.

8 THE COURT: In other words, you don't know what
9 position the government is going to take so you haven't been
10 able to advise your client in regard to that.

11 MS BENETT: I have asked and I have not received a
12 response.

13 THE COURT: Ms. Fletcher.

14 MS. FLETCHER: Your Honor, given the terms of
15 Ms. Marcus' plea agreement -- the government, in the context of
16 these cooperation agreements, does not come to an agreement
17 with the defendant as to the loss amount or as to other
18 sentencing enhancements that might apply in calculating the
19 defendant's guidelines range. In this case, that is in part
20 because, while we have met with Ms. Marcus on several occasions
21 and we have some understanding of her participation in this
22 conspiracy, we do not yet have an understanding of the full
23 scope. And so we have not come to a conclusion as to what our
24 recommendation would be to the probation department in terms of
25 the appropriate loss amount for Ms. Marcus.

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1 Now that loss amount, given the charge, is a
2 significant component of her guidelines range, so we're not in
3 a position to say what we think her guidelines would be. We
4 have an understanding of the extent of her criminal history,
5 and we discussed that at length with both Ms. Marcus and with
6 her counsel, and we have discussed generally what other
7 sentencing enhancements might apply based on plea agreements we
8 have entered in this case with other defendants. We're just
9 not in a position to project at this point what we think her
10 ultimate guidelines range would be, as is the case with nearly
11 every --

12 THE COURT: No, that I understand, but it seems to me
13 that the defendant is entitled know -- maybe not from the
14 government, maybe from her own lawyer -- what the possible
15 ranges that the government is going to be advocating are based
16 on what the defense knows.

17 Ms. Bennett, is your position that you're simply unable
18 to advise your client on the various scenarios of what the
19 government would be presenting to the probation department?

20 MS BENETT: I have heard from the government the
21 methodology that they employed in calculating the loss amount
22 for other defendants in the case. I believe if that were the
23 same methodology used for Ms. Marcus that I could make a
24 reasonable prediction of the loss amount and I could predict
25 with some confidence the other guidelines enhancements that

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1 would be at play.

2 By way of background, Ms. Marcus had been working with
3 law enforcement in other districts for several years. She came
4 forward I believe in 2016 to reveal information about the fraud
5 and began proactively cooperating in the District of Utah and
6 the District of Arizona. So she understood that she had
7 certain protections that had not been -- her understanding of
8 her protections was not consistent with what the government
9 had -- as I understand it, what the government had intended to
10 represent.

11 She came here on Tuesday expecting to provide
12 information to the government to assist them in their upcoming
13 prosecution before the Court beginning next month. It became
14 evident I think very early on upon her arrival that she was at
15 risk of her own criminal exposure here, notwithstanding
16 conversations that she had with agents and prosecutors in other
17 districts. The risk of facing an indictment without a
18 cooperation agreement was one that we discussed, and that, on
19 balance, Ms. Marcus decided was not in her best interest, and
20 we proceeded with meeting with the government, and we are now
21 here today.

22 With the posture of the case and sort of the timeline,
23 I do not have adequate information to be able to tell her what
24 the loss amount would be. I certainly would take the position
25 that the same methodology that was employed for co-defendants

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1 should be employed here, and if that is the case, I could give
2 a guidelines calculation. Unless the government can represent
3 that that's the same methodology that they would use, I cannot
4 adequately advise her about what I would predict a guidelines
5 calculation would come out to.

6 THE COURT: Can you advise her as to the various
7 options that, in your view, the government has available to it
8 in terms of its recommendations for sentencing, or rather its
9 recommendations for a guidelines calculation?

10 MS BENETT: Yes, that I can and I have -- that I can
11 and I have done in terms of discussing whether it would be the
12 way that the government -- the various methods that the
13 government could employ in arguing for loss amount, we have
14 discussed that. And I have discussed with her how the
15 government -- as I understand it, how government has calculated
16 the loss amount in other cases, but again, I can't represent,
17 because the government hasn't told me how it would calculate
18 her guidelines, what methodology it would employ in her case.

19 THE COURT: Ms. Fletcher.

20 MS. FLETCHER: Your Honor, that's right. The question
21 in terms of the guidelines calculation issue here is what
22 losses are reasonably foreseeable to the defendant based on her
23 role in the conspiracy. And as your Honor can see from the
24 cooperation agreement, she was involved in this wire fraud
25 conspiracy for a long time. She was also working with

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1 different groups of people on different sales floors in
2 different roles over time, so her visibility into the full
3 scope of the fraud at each floor may very well be different as
4 she moves from one to the next. I would agree with Ms. Benett
5 that her personal compensation, based on the information the
6 government has, was quite low.

7 Now I think we need to explore with her further in the
8 context of her cooperation what she understood about the scope
9 of the fraud and what losses were reasonably foreseeable to
10 her. And that is a discussion we will certainly have with
11 Ms. Benett in advance of her sentencing, but we have not had it
12 up until this point.

13 THE COURT: And why not?

14 MS. FLETCHER: In part because of the timing of this
15 proceeding, and in part because --

16 THE COURT: Well, this can be adjourned for you to
17 have those discussions.

18 MS. FLETCHER: It could, your Honor. I'm not sure
19 that it's required, so long as Ms. Marcus has been advised
20 about the different ways in which the guidelines may be
21 calculated, and so long as she understands that the government
22 is not promising her a particular methodology or a particular
23 guidelines calculation at this point.

24 And I just note, your Honor, your Honor has taken a
25 number of pleas in this case with similar terms, and the

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1 government's view is that that was appropriate for the Court to
2 do without having the benefit of a specific guidelines
3 calculation for each defendant.

4 THE COURT: Were the other defendants in the same
5 posture in terms of their knowledge of what the government's
6 intentions were at sentencing?

7 MS. FLETCHER: Your Honor, I can't speak to what each
8 of those individual defendants knew, but none of their plea
9 agreements --

10 THE COURT: Well, it shouldn't be -- it's what the
11 government was telling them, and you're privy to what the
12 government was telling them.

13 MS. FLETCHER: I could represent that in none of those
14 cases did the government make a representation to any would-be
15 cooperating defendant as to what their loss amount would be at
16 the time of sentencing. The representations that the
17 government has made in the past are the same as they're making
18 here, which is that the guidelines would be calculated in
19 connection with sentencing, and that government makes certain
20 promises pursuant to the plea agreement, but none of those
21 promises relate to how the loss amount will be calculated or
22 how that calculation will ultimately make its way into a final
23 guidelines calculation.

24 THE COURT: All right. Ms. Marcus, you can see the
25 government is taking the position that it simply doesn't know

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1 what the appropriate -- in its view -- loss amount is; in other
2 words, what the loss was that resulted from your criminal
3 conduct. And certainly the loss amount is an important factor
4 in the guideline calculations. So you're not being given any
5 assurance by the government in regard to that.

6 I assume you realize that whatever the government's
7 position is, it's me, it's the Court who makes the ultimate
8 decision in such matters. And I can accept or reject the
9 government's position, just as I can accept or reject the
10 defense position on what the loss amount is or with regard to
11 any aspect of the sentencing guidelines.

12 I guess the issue for you, Ms. Marcus, is do you feel
13 comfortable that you have enough knowledge about how the
14 guideline works and have had enough time to have your attorney
15 answer your questions about how the guidelines work to proceed
16 with pleading guilty today?

17 MS BENETT: Your Honor, could I talk to the government
18 briefly?

19 THE COURT: Yes, take as much time as you want.

20 (Pause)

21 MS BENETT: Your Honor, I apologize for the delay.
22 Thank you for giving us the opportunity to talk.

23 THE COURT: No need. I want to make certain that she
24 understands, to the extent possible, how the guidelines work
25 and what the potential exposure for her is in terms of what the

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1 government -- the position the government will take.

2 MS BENETT: And we have had an opportunity to speak
3 about the various ranges and the various factors that could
4 come into play here and what that could mean in terms of the
5 high end of a guidelines calculation, and what arguments she
6 and I will be able to present addressing any disagreements that
7 we have with the government. So if the Court wants to ask
8 Ms. Marcus that question again, I think she's prepared to
9 answer.

10 THE COURT: All right. Ms. Marcus, I want to be
11 comfortable, if it's true, that you understand how the
12 guidelines work and the potential exposure to you for entering
13 into a cooperation agreement. Do you feel comfortable with
14 that?

15 THE DEFENDANT: I do.

16 THE COURT: All right. And has Ms. Benett explained
17 to you how the guidelines work?

18 THE DEFENDANT: She has, your Honor.

19 THE COURT: And the role of the loss amount in the
20 guideline calculation?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: And the various elements that go into
23 determining what a guideline calculation is?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: Do you understand that I have to determine

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1 what the relevant guideline range is, but I can't do that until
2 after I receive a report from the probation department. Do you
3 understand that?

4 THE DEFENDANT: Yes.

5 THE COURT: And the probation department is going to
6 interview you. That's because their report is going to involve
7 a lot of things, including reporting to me about your
8 upbringing, any criminal history that you have, your employment
9 history, your educational history, what your family situation
10 is, that is, if you are married, divorced, children, your
11 upbringing in general, and a variety of other things. So I
12 want you to give them accurate and complete information. Do
13 you understand that?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: And your attorney will have the right to
16 be there if she wants to. And they will speak to the
17 government also. They then will write a report to me with
18 their view of what the guideline range is, and then I attempt
19 to determine what the guideline range is.

20 But in determining what a fair and appropriate
21 sentence is, after I determine what the guideline range is, I
22 then have to determine whether there are grounds to depart from
23 the guideline range, either up or down. In other words, I have
24 the ability to sentence you higher than the guideline range on
25 a departure basis or lower than the guideline range on that

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1 same basis. Do you understand that?

2 THE DEFENDANT: Yes, your Honor.

3 THE COURT: And after I do that, I then must apply all
4 of the factors in Section 3553 that go into a determination by
5 me of what the appropriate sentence for you should be, and one
6 that's sufficient but not greater than necessary to meet the
7 ends of the criminal justice system as set forth in Section
8 3553(a). Do you understand that?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: Now do you understand that if you're
11 sentenced to prison, parole has been abolished, and you won't
12 be released from a prison sentence any earlier on parole?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: And do you understand that if anyone has
15 attempted to tell you what your sentence is going to be or
16 should be or will be or may be, everybody can be wrong. And
17 the reason for that is that I am the one who is going to
18 sentence you, and I don't know what your sentence is going to
19 be. And the reason I don't me what your sentence is going to
20 be is because I don't have the information I need about you and
21 your crime. Do you understand that?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: And if I sentence you to a term that is
24 different from what you are thinking it's going to be or
25 different from what anyone has told you it's going to be, you

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1 still are going to be bound to today's guilty plea and you
2 won't be able to withdraw it. Do you understand that?

3 THE DEFENDANT: Yes.

4 THE COURT: Now I have a document that I'm asking the
5 government to mark as -- I'm sorry, asking my deputy to mark as
6 Government Exhibit 2. And it's a letter dated September 28,
7 five pages long, it's a letter addressed to Ms. Benett from --

8 Is that Benet Kearney's signature?

9 MS. FLETCHER: It is, your Honor?

10 THE COURT: Ms. Benett is the addressee, and the
11 signatory is Benet Kearney.

12 Show that to the defendant, please.

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: It's your signature?

15 THE DEFENDANT: Yes.

16 THE COURT: Before you signed that, did you discuss
17 that agreement with Ms. Benett?

18 THE DEFENDANT: I did.

19 THE COURT: And did you understand it at the time you
20 signed it?

21 THE DEFENDANT: Somewhat. I understand it a lot more
22 now.

23 THE COURT: I'm going to give you all the time you
24 want now to ask additional questions of Ms. Benett, because
25 it's important that you understand it and that all of your

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1 questions are answered.

2 You seem a little hesitant to ask me to enter a plea
3 of guilty, and I certainly understand that, because you're
4 nervous.

5 THE DEFENDANT: I am. And I'm sorry, your Honor, I
6 came out to New York expecting something completely different
7 to happen and I was kind of blindsided.

8 THE COURT: All right. And that's why I want to give
9 you whatever time you want. I don't want you to be blindsided,
10 and if you are blindsided, I want to make sure that you feel
11 comfortable with the representation of Ms. Benett.

12 THE DEFENDANT: I do.

13 THE COURT: And that she answered your questions.

14 THE DEFENDANT: She has.

15 THE COURT: I'm not going to rush you at all, and I'm
16 sure Ms. Benett and Ms. Fletcher don't want to.

17 THE DEFENDANT: It's fine.

18 THE COURT: So again, if you want more time, I'm
19 prepared to give it to you.

20 THE DEFENDANT: I understand.

21 THE COURT: Do you want me to proceed?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: Okay. So one of the questions I have for
24 you is do you feel -- I understand that you now understand the
25 plea agreement, which is Government Exhibit 2, better than you

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1 used to. Again, everything you say makes sense. The more
2 questions you ask, the more answers you get, the more you
3 understand something. But I want to make sure that you don't
4 have any more questions of Ms. Benett and you feel you fully
5 understand the agreement. And if you don't, I am going to give
6 you whatever time you need to discuss it further with
7 Ms. Benett.

8 THE DEFENDANT: Thank you, your Honor. I do believe
9 that I understand it.

10 THE COURT: All right. And again, you can stop me at
11 any time.

12 THE DEFENDANT: Thank you.

13 THE COURT: So do you believe you now fully understand
14 the agreement?

15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: All right. Do you have any questions of
17 me about the agreement?

18 THE DEFENDANT: No, your Honor.

19 THE COURT: Does that letter agreement, Government
20 Exhibit 2, constitute your complete and total understanding of
21 the entire agreement between the government, Ms. Benett, and
22 yourself?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: Are there any side deals here? Have you
25 reached any agreement with the government that is not contained

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1 in Government Exhibit 2?

2 THE DEFENDANT: No, your Honor.

3 THE COURT: Has anyone offered you any inducements or
4 threatened you or forced you to plead guilty or enter into the
5 plea agreement?

6 THE DEFENDANT: No.

7 THE COURT: You are you entering that the plea
8 agreement of your own free will?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: Nobody forced you to do it, is that what
11 you're telling me?

12 THE DEFENDANT: Correct.

13 THE COURT: Do you understand that in this agreement
14 you've admitted the forfeiture allegation in the superseding
15 information, and you have agreed to forfeit to the United
16 States a sum of money that represents the amount of the
17 proceeds traceable to the commission of the crime by you?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: Do you understand that in this agreement
20 you waived the right to assert the statute of limitations as a
21 defense to the action against you?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: Ms. Benett, are you aware of any valid
24 defense that would prevail at trial or know of any reason why
25 Ms. Marcus should not be permitted to plead guilty?

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1 MS BENETT: No, your Honor.

2 THE COURT: Is there an adequate factual basis to
3 support her plea, in your view, Ms. Bennett?

4 MS BENETT: There is, your Honor.

5 THE COURT: Is that true of the government as well?

6 MS. FLETCHER: Yes, your Honor.

7 THE COURT: Ms. Marcus, tell me now, give me the facts
8 that make you guilty of the crime of conspiring to engage in
9 wire fraud.

10 MS BENETT: And your Honor, Ms. Marcus and I sat down
11 together before the hearing and wrote out -- she dictated to me
12 and I wrote out and made changes after she made it out so she
13 would have an opportunity to read a description of her conduct,
14 is that -- given her state of mind, is that okay with the
15 Court?

16 THE COURT: Yes. Ms. Marcus, you can certainly read
17 something. I'm just asking that you read it slowly because we
18 have a court reporter here and people tend to read quickly when
19 they're nervous. And I assume that your lawyer assisted you;
20 in fact, your lawyer told me she assisted you in writing that.
21 All of that is perfectly fine. But I do need to know that what
22 you are about to read to me is true. And you're under oath, so
23 is what you're about to read to me true?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: Why don't you tell me what you did in

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1 connection with the superseding indictment which charges you
2 with conspiring to engage in wire fraud.

3 THE DEFENDANT: Your Honor, from about 2008 until
4 early 2017 I worked in various telemarketing operations where I
5 agreed with others to market and sell products promising
6 financial returns that we knew the customers would never
7 receive. During these years I was based in Utah and Arizona
8 and I worked with others in New Jersey and other states. As
9 part of the scheme, we called potential customers all over the
10 country, including in Manhattan.

11 THE COURT: Government, anything else on any of these
12 proceedings, because you are, I hope, keeping a checklist, is
13 there anything else that you want?

14 MS. FLETCHER: I was keeping a checklist, and no, your
15 Honor, thank you.

16 THE COURT: Ms. Benett, is there anything that the
17 defense wants?

18 MS BENETT: No, your Honor.

19 THE COURT: When you did the acts just told me about,
20 Ms. Marcus, did you know that what you were doing was wrong and
21 illegal?

22 THE DEFENDANT: Yes.

23 THE COURT: Government, what evidence do you have
24 against this defendant?

25 MS. FLETCHER: Your Honor, at a trial against this

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1 defendant we would present testimony from victims of this
2 scheme who spoke directly with the defendant. We would also
3 introduce recordings, consensual recordings made by those
4 victims of conversations with the defendant, as well as text
5 message and email communications between the defendant and
6 other members of the conspiracy, and finally we would introduce
7 the testimony of cooperating witnesses regarding their
8 understanding of her role in the scheme.

9 THE COURT: All right. Ms. Marcus, how do you now
10 plead to the charge against you in Superseding Information S9
11 17 Crim 243, guilty or not guilty?

12 THE DEFENDANT: Guilty, your Honor.

13 THE COURT: Are you pleading guilty because you are
14 guilty?

15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: Are you pleading guilty voluntarily and of
17 your own free will?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: Because you acknowledge you're guilty as
20 charged, because I find you know your rights and are waiving
21 them knowingly and voluntarily, because I find your plea is
22 entered knowingly and voluntarily and is supported by an
23 independent basis in fact containing each of the essential
24 elements of the offense, I accept your guilty plea, Ms. Marcus,
25 and I determine you to be guilty of conspiring to engage in

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1 wire fraud.

2 I'm going to set the sentencing control date at
3 January 10, 2019 at 3:30 p.m.

4 I have a report here from the pretrial services
5 office, and we have had the pretrial services officer patiently
6 present during this proceeding. What's the position of the
7 parties? Government?

8 MS. FLETCHER: Your Honor, the parties have an
9 agreed-upon bail package for your Honor's consideration.

10 THE COURT: All right. Again, I read the pretrial
11 services report. What's the agreed-upon package?

12 MS. FLETCHER: Your Honor, the defendant to be
13 released on her own recognizance, subject to regular pretrial
14 supervision, including drug testing and treatment as directed
15 by pretrial, mental health treatment as directed by pretrial,
16 the defendant to surrender any passport -- I understand she
17 doesn't have a passport, so to make no new applications for any
18 travel documents -- and for the defendant's travel to be
19 restricted to the continental United States.

20 THE COURT: Who is going to supervise her?

21 MS. FLETCHER: She will be supervised in the district
22 of residence, which I understand is the District of Arizona.

23 THE COURT: Her own recognizance, is that the
24 agreement, her own recognizance?

25 MS. FLETCHER: Yes, your Honor.

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1 THE COURT: Defense?

2 MS BENETT: There were a couple of things that I had
3 not discussed previously with the government, specifically
4 mental health treatment and drug treatment. Certainly
5 Ms. Marcus -- I know that pretrial recommended that, but I
6 don't think it's appropriate in this case. She is
7 participating in a methadone clinic where she will be
8 supervised by pretrial. She will give urine samples at
9 pretrial. She gives urine samples at her methadone clinic.

10 She is working on finding employment, and in my
11 experience, mental health treatment programs directed by
12 pretrial often have payment requirement for my clients that
13 presumably under her circumstances is very hard to meet. I
14 understand that pretrial heard from Ms. Marcus' mother that
15 she's depressed. I'm not opposed to her voluntarily seeking
16 mental health treatment, but my concern with that being part of
17 the pretrial supervision package or Court ordered or Court
18 approval of pretrial recommendation is that if for some reason
19 she doesn't go to a counseling session she's at a risk of being
20 in custody, and I don't think there are circumstances here
21 warranting it be part of the pretrial package. She's been
22 participating for over two years with the federal government
23 and hasn't had any problem. She responds when they call --

24 THE COURT: I'm not going to require drug treatment,
25 but I am going to require periodic drug testing, which is part

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1 of regular pretrial.

2 MS BENETT: That we have no objection to.

3 MS. FLETCHER: Your Honor, it was not the government's
4 intention to misrepresent the agreed-upon terms. I thought we
5 discussed that term specifically --

6 THE COURT: Move on.

7 MS. FLETCHER: -- but to the extent that the Court and
8 pretrial are comfortable with testing and then they can raise
9 any issues --

10 THE COURT: If their test is positive, the district of
11 residence will notify the district here and they will notify
12 me.

13 MS. FLETCHER: That's fine, your Honor.

14 THE COURT: All right. I am going to grant the
15 agreed-upon bail package as follows: The defendant will be
16 released on her own recognizance. She is to be supervised with
17 regular pretrial supervision to include periodic drug tests.
18 She is to turn over her passport, and I understand she said she
19 doesn't have a passport, and I'm directing her to make no new
20 applications for travel. Her travel is restricted to the
21 continental United States. That's the agreed-upon bail
22 package, and that's the bail package that I'm imposing.

23 I take it the defense has seen the pretrial services
24 report, correct?

25 MS BENETT: I have, your Honor.

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1 THE COURT: You should speak with your client in
2 regard to the need for her to seek medical attention, because
3 based on what's here, I would think that should be her number
4 one job.

5 MS BENETT: Yes, I will have a -- I will talk about it
6 with her.

7 THE COURT: That's not something that you want to put
8 off.

9 Anything else, government?

10 MS. FLETCHER: Not from the government, thank you,
11 your Honor.

12 THE COURT: Anything else, defense?

13 MS BENETT: No, your Honor, thank you.

14 THE COURT: Thank you all.

15 (Adjourned)